



March 4, 2014

**BY ELECTRONIC MAIL**

Vicki Ferguson  
Region 8, Mailcode: 8-OC  
U.S. Environmental Protection Agency  
1595 Wynkoop Street  
Denver, CO 80202  
[R8foia@epa.gov](mailto:R8foia@epa.gov)

**Re: Freedom of Information Act Request, Clean Air Act Title V Operating Permit Applications**

Dear Vicki:

Pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, WildEarth Guardians respectfully requests the following records from Region 8 of the Environmental Protection Agency ("EPA"):

1. Any and all pending applications before EPA Region 8 for Clean Air Act Title V Operating Permits submitted pursuant to 40 C.F.R. Part 71. For purposes of this request, pending applications include all applications that have been submitted, but for which final issuance or denial has not yet occurred.

**REQUEST FOR FEE WAIVER**

WildEarth Guardians requests that you waive all fees in connection with this matter if this request is treated as a FOIA request. As shown below, we meet the two-pronged test under FOIA for a fee waiver, 5 U.S.C. § 552(a)(4)(A)(iii):

**I. Disclosure of this information is in the public interest because it will significantly contribute to public understanding of the operations or activities of government.**

In considering whether WildEarth Guardians meets this fee waiver criteria, it is imperative that the EPA remember that FOIA, in general, carries a presumption of disclosure and that the fee waiver amendments of 1986 were designed specifically to allow non-profit, public interest groups such as WildEarth Guardians access to government documents without the payment of fees. As stated by one Senator, "[A]gencies should not be allowed to use fees as an offensive weapon against requesters seeking access to Government information . . ." 132 Cong.

Rec. S. 14298 (statement of Sen. Leahy). In interpreting this amendment, the 9th Circuit has stated that:

“The amended statute ‘is to be liberally construed in favor of waivers for noncommercial requesters.’ (citing Sen. Leahy). The amendment’s main purpose was ‘to remove the roadblocks and technicalities which have been used by various Federal agencies to deny waivers or reductions of fees under the FOIA.’ “ (citing Sen. Leahy).

*McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th Cir. 1987).

Thus, both Congress and the courts are clear in their interpretation that the main legislative purpose of the amendments is to facilitate access to agency records by watchdog organizations, such as environmental groups, which use FOIA to monitor and challenge government activities. As the influential District of Columbia Circuit Court of Appeals has stated:

“This waiver provision was added to FOIA ‘in an attempt to prevent government agencies from using high fees to discourage certain types of requesters and requests,’ in clear reference to requests from journalists, scholars, and, most importantly for our purposes, nonprofit public interest groups.”

*Better Gov’t Ass’n v. Department of State*, 780 F.2d 86, 93-94 (D.C. Cir. 1986), quoting *Ettlinger v. FBI*, 596 F. Supp. 867, 876 (D. Mass. 1984).

A. The subject of the request concerns “the operations and activities of the government.”

As this is a request for documents from an executive branch agency, the EPA, it is clear that this request concerns the operations and activities of government. The information is directly related to the agency’s implementation of the Clean Air Act.

B. The disclosure is “likely to contribute” to a public understanding of government operations or activities (the informative value of the information to be disclosed and ability to disseminate).

The information requested will help provide insight into current Title V Operating Permit applications pending before the EPA. Guardians understand that many of these applications are for facilities on the Uintah and Ouray Reservation in the Uinta Basin of northeastern Utah and in other tribal areas where air quality concerns are becoming a growing public concern. Furthermore, Guardians understands that many of these applications are for facilities involved in the production and processing of oil and gas. There is growing public concern over the impacts of oil and gas production and processing on air quality within Region 8.

We intend to use the requested information to contribute to public understanding of the role of EPA in permitting facilities involved in the production and processing of oil and gas under Title V of the Clean Air Act, as well as to inform the public as to the substance of these

applications and their relation to relevant air quality issues. For instance, we intend to use the requested information to understand whether and to what extent EPA may be acting in a timely manner on Title V Permit applications and whether and to what extent this may be affecting air quality. Public concern over air quality in relation to oil and gas development is extremely high, particularly in the Uinta Basin of Utah. Recent media coverage of the issue has highlighted the fact that oil and gas development is likely contributing to high ozone and other air quality issues, generating public concern. *See* Exhibit 1.

WildEarth Guardians has specifically and consistently demonstrated its ability to disseminate information obtained from the EPA. We accomplish this information dissemination through printed media (both paid media and earned media), our email list, list-serves to which we post, printed publications we write and distribute via mail and the internet, articles and essays for other public interest organizations, and public meetings held or sponsored by us, other nonprofit public interest entities, or federal agencies. In the past, we have disseminated information by sharing it with the media, by sharing it with other nonprofit organizations who share it with their members and the media, and by sharing it with our members, which total more than 40,000.

WildEarth Guardians is a non-profit organization that informs, educates, and empowers the public regarding environmental issues, policies, and laws. We have been involved in EPA operations for many years and have consistently displayed our ability to disseminate information granted to us through FOIA fee waivers. Recent newspaper articles have featured WildEarth Guardians and the information it has gathered under FOIA. *See* Exhibit 2. We intend to use the requested information to advance public knowledge and understanding of the role that EPA plays in regulating air quality in relation to Title V Permitting and how that may or may not be affecting air quality in Region 8.

In granting a fee waiver to WildEarth Guardians, it is important to recognize that (1) our requested information will contribute significantly to the public understanding of the operations or activities of the government, (2) our requested information will enhance the public's understanding to a greater degree than currently exists, (3) WildEarth Guardians possesses the expertise to explain the requested information to the public, (4) WildEarth Guardians possesses the ability to disseminate the requested information to the general public, (5) and that the news media recognizes that WildEarth Guardians is an established expert in the field of air quality and the Clean Air Act.

WildEarth Guardians staff and contractors responsible for interpreting, compiling and presenting this information to the public in an understandable manner possess the requisite experience, intelligence and expertise to carry out this task. WildEarth Guardians has consistently proven its ability to disseminate information obtained from the EPA.

C. The disclosure is likely to contribute “significantly” to public understanding of government operations or activities.

Public oversight and enhanced understanding of EPA's implementation of the Clean Air Act as it relates to Title V Permitting is necessary for the public to understand EPA's role in

permitting sources of air pollution and the implications to air quality in Region 8. Here, the requested applications will provide information regarding emissions from facilities and will shed light on whether EPA is moving to issue or deny Title V Permits in a timely and effective manner. The requested applications will further provide information that will help the public understand the extent to which EPA plays a role in authorizing sources of air pollution to operate in Region 8 and what this means for local and regional air quality conditions.

WildEarth Guardians' track record of active participation in oversight of issues related to the permitting of sources of air pollution, particularly EPA's permitting under Title V of the Clean Air Act, is well established. Over the years, WildEarth Guardians has engaged in EPA permitting processes and shared information to the public regarding these processes. In 2012, EPA and WildEarth Guardians reached an agreement regarding the review of Title V Permits for oil and gas operations. This agreement is posted on the web at <http://www2.epa.gov/region8/wildearth-guardians-v-usepa-no-11-9527>. This agreement was shared with the media and the public and generated greater public attention to the issues and controversies surrounding EPA's permitting of oil and gas operations under 40 C.F.R. Part 71. Our involvement in EPA permitting issues under the Clean Air Act and ability to disseminate information related to those issues has significantly contributed to the level of public understanding. In most, if not all, cases, there would be no understanding of the issues and controversies around EPA's Title V Permitting processes without WildEarth Guardians' ability to contribute to public understanding.

WildEarth Guardians has submitted comments to EPA on its Title V Permits, has engaged in numerous discussions with the agency regarding Title V Permits, has appealed and litigated Title V Permits, and has members and supporters who are concerned over EPA's role in permitting sources of air pollution in Region 8. In determining whether the disclosure of requested information will contribute significantly to public understanding, a guiding test is:

“whether the requester will disseminate the disclosed records to a reasonably broad audience of persons interested in the subject.”

*Carney v U.S. Dept. of Justice*, 19 F.3d 807 (2nd Cir. 1994) (emphasis added).

The information requested in this FOIA request will be used to contribute to one or more of the following: local and national newsletters, public presentations, e-mail and postal mail publications, and local and national news stories contributed to or written by WildEarth Guardians and its members. The most likely sources of dissemination will be through local and regional media who have reported on issues of air quality in Region 8, including in the Uinta Basin of northeastern Utah. We intend to assess the information provided to determine whether and to what extent EPA is ensuring adequate permitting of facilities under Title V of the Clean Air Act and to share our assessment with the media throughout the region. We also intend to share the results of our assessment with our members, other nonprofit organizations, and other concerned entities, including local air pollution agencies and health departments.

1. The use of these records will add new and different information to the public understanding.

The information requested has not yet been analyzed, summarized, and disseminated by any member of the public, thus its use will add new and different information to public understanding.

2. Whether all or a portion of the broadscale records will be used to enlighten the public.

We do not consider this request to be broadscale, but a specific and focused request for specific Title V Permit applications currently pending before EPA. All the documents will be used, because all are necessary for gaining a true understanding of the issues, the nature of the applications, and EPA's role in permitting sources of air pollution to operate in Region 8.

3. Whether any of the records consist of generic information which lack substantial informative value.

It is our belief that there is no 'generic' information on this topic, due to the public's limited perception of this subject.

4. Whether any of the requested information has already been publicly available either in a duplicative or a substantially identical form, or is readily available from another source.

To the best of our knowledge, the documents requested in this FOIA have not been released to the public. If any of the requested documents are available online or otherwise readily accessible by the public, we request the EPA inform us so that we may narrow our request and minimize the amount of time and resources spent on responding to this FOIA request.

## **II. Obtaining the information is of no commercial interest.**

Access to government documents, disclosure forms, and similar materials through FOIA requests is essential to WildEarth Guardians' role of educating the general public. WildEarth Guardians, a non-profit organization, has no commercial interest and will realize no commercial benefit from the release of the requested information.

Should you decide not to waive fees, we request that you contact us prior to incurring any costs in excess of \$25. Please feel free to request additional information concerning our fee waiver request if you believe it is needed to make a final decision.

If you elect to withhold any documents responsive to this request under Exemption 5 of FOIA, please explain:

- 1) Why is each document predecisional?
  - a. To what decision are each of the documents leading?
  - b. Has this decision been finalized?

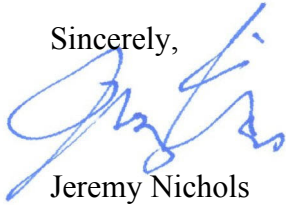
2) Why is each document deliberative?

a. To what extent does each make a recommendation on a legal or policy matter?

3) What policy recommendation qualifies this document for exemption?

We look forward to your reply within twenty working days as required by FOIA, 5 U.S.C. § 552(a)(6)(A)(i). Please direct all responses and/or correspondence regarding this FOIA request to the address and contact information below. Thank you.

Sincerely,



Jeremy Nichols  
Climate and Energy Program Director  
WildEarth Guardians  
1536 Wynkoop, Suite 301  
Denver, CO 80202  
(303) 437-7663  
[jnichols@wildearthguardians.org](mailto:jnichols@wildearthguardians.org)

# **Exhibit 1**

# Groups renew call for ozone designation in Uintah Basin

By Amy Joi O'Donoghue, Deseret News

Published: Wednesday, Jan. 29 2014 5:49 p.m. MST

Updated: Wednesday, Jan. 29 2014 5:49 p.m. MST

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Air quality suffers as an inversion covers the Salt Lake valley Thursday, Jan. 23, 2014. New results from ozone readings in eastern Utah and western Colorado are causing multiple groups to once again call for the EPA to declare the 10,000-square-mile region out of compliance with federal standards to protect public health.

Jeffrey D. Allred, Deseret News

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## Summary

New results from ozone readings in eastern Utah and western Colorado are causing multiple groups to once again call for the EPA to declare the 10,000-square-mile region out of compliance with federal standards to protect public health.

SALT LAKE CITY — Multiple groups are renewing their push for the EPA to declare the Uinta Basin's oil- and gas-producing region in both Utah and Colorado as "non-attainment" with federal clean air standards because of high winter ozone concentrations.

A petition filed Wednesday by WildEarth Guardians, Utah Physicians for a Healthy Environment and the Southern Utah Wilderness Alliance urges the Environmental Protection Agency to act now rather than later to accelerate smog-reduction efforts in the region.

The petition, which is separate from a lawsuit already filed against the EPA by the groups, asks for the dirty air designation and for revisions to Utah and Colorado state plans to address ozone.

"The need to undertake these actions is critical," the groups' petition said. "Ozone, considered the key ingredient of smog, is a significant threat to public health and welfare."

The groups say new data from 2013 bolster the need for agency action to protect public health, with monitoring stations in both states that show impacted counties are either violating, near violating or "grossly exceeding" national ozone standards.

"The fact that both the Colorado and Utah portions of the Uinta Basin share common air quality patterns is underscored by the fact that both areas share common industrial characteristics and sources of air pollution, primarily extensive oil and gas development, the source

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primarily extensive oil and gas development, the source of the vast majority of ozone precursors in the region," the petition reads.

The groups note that regional ozone levels reached extremely high levels, with Vernal eclipsing the federal threshold at one point by 60 percent. In its annual report, the Utah Department of Environmental Quality noted that ozone values exceeded the threshold for 22 days in Vernal and 29 days in Roosevelt. Individual episodes of elevated ozone ranged from three to nearly 15 days in length during the 2013 study period.

The state, however, argues that insufficient data exist — results that go back through a three-year period — to merit the EPA designation and that such an action would be premature given an ongoing multiyear study.

In a brief filed in the court case two weeks ago, the state insisted the EPA's conclusion that the region is "unclassifiable" should stand because the groups are trying to wrongly assert that "any" data is sufficient for action.

"It is important to re-emphasize that the standard is not based on individual exceedances, but an exceedance by the fourth-highest daily maximum eight-hour concentration, averaged over a three-year period," the brief argues. "Not only is it irrelevant to the determination if there are single exceedances on a given day or over a given period, but without three years of certified, quality assured data, EPA cannot reach an attainment/non-attainment designation for ozone."

Utah is one of nearly a dozen entities including federal agencies, university scientists, the oil and gas industry and impacted counties that are trying to determine why ground level ozone persists in the region in the winter. In what has been described as the largest and most expensive air quality study in the state, atmospheric scientists, chemists and others are analyzing the conditions that must exist for ozone formation.

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itsjustme Vernal, UT

It gets very cold for long periods of time here in the Uintah Basin. It can go weeks with no wind to stir the atmosphere up. Ozone is a mostly-naturally occurring gas. How does someone propose to regulate something that occurs naturally?

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deserthound Salt Lake City, UT

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## SLCBob SALT LAKE CITY, UT

Thank goodness for groups like Utah Physicians for a Healthy Environment, WildEarth Guardians, and SUWA that fight to protect us from air pollution. Utah's leading politicians certainly don't.

12:11 p.m. Jan. 30, 2014 | ★ Top comment

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## About the Author



Amy Joi O'Donoghue

Amy Joi O'Donoghue is the environmental reporter the Deseret News, specializing in coverage of issues that affect land, air, water and energy development. She has worked here since 1998 and has been an assistant city [more](#) ..

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# **Exhibit 2**

## Advocates sue EPA over lack of action on permit for Utah coal-fired plant

Energy • WildEarth Guardians says the agency has missed a mandatory deadline to act on the plant's permit request.

BY LISA SCHENCKER

THE SALT LAKE TRIBUNE

PUBLISHED: DECEMBER 23, 2013 10:04PM

UPDATED: DECEMBER 23, 2013 10:16PM

An advocacy group filed a lawsuit Monday against the U.S. Environmental Protection Agency for what it claims is inadequate oversight of pollution coming from a Uinta Basin coal-fired power plant.

The nonprofit WildEarth Guardians says the EPA is long overdue in issuing or denying an operating permit to the Bonanza power plant in northeastern Utah, leaving room for pollution violations. WildEarth filed the lawsuit in federal court in Denver.

Jeremy Nichols, WildEarth climate and energy director, said such operating permits outline exactly what individual power plants must do to comply with the Clean Air Act.

"It's a very important document both for regulators and the public," Nichols said. "As it operates and spews out pollution from its smokestack, we can be assured it is meeting all the requirements under the Clean Air Act."

Richard Mylott, a spokesman for the EPA in Denver, did not immediately comment but said the agency will review the lawsuit.

According to the group, the plant on the Uintah-Ouray Indian Reservation emits more than 3.5 million tons of pollution each year, including carbon dioxide, sulfur dioxide, nitrogen oxides, and other toxic compounds such as mercury.

It's a particular problem in the Uinta Basin, which already suffers from high ozone levels, Nichols said. Ground-level ozone can lead to asthma, scarred lungs and premature death.

"If we don't have the right checks, the right permits in place, we can't be assured public health is protected," Nichols said.

The lawsuit claims the EPA missed a mandatory October deadline to resolve a permit application filed by the plant's owner, Deseret Power, in 2012. It asks the court to order the EPA to issue or deny the permit within 30 days.

The group also claims that there is mounting evidence the plant is not operating in compliance with the Clean Air Act, and says it notified Deseret Power of violations in 2012.

Deseret Power, based in South Jordan, did not immediately return a call seeking comment Monday afternoon.

Deseret Power and federal regulators reached a settlement earlier this year in which the company was required to pay \$35,000 in penalties, install new controls during startup and shutdown, and cover the cost of replacing at least five fleet vehicles with natural gas models.

Nichols said his group would like to see the terms of that settlement incorporated into the permit to be sure the company is following through.

lschencker@sltrib.com

—

### Pursing a 'major polluter' permit

The nonprofit WildEarth Guardians sued the U.S. Environmental Protection Agency (EPA) Monday, arguing it is long overdue in issuing or denying an operating permit to the Bonanza power plant in northeastern Utah. The federal suit includes this timeline.

**Permitting begins** • In 1990, the Clean Air Act was amended to establish permits for major polluters, such as the power plant.

**A dropped draft** • In 2002, the EPA prepared and sought public comment on a draft permit for the plant but never took final action.

**A new start** • In February 2012, the EPA asked owner Deseret Power to submit a new permit application.

**Application filed** • On April 5, 2012, the EPA received Deseret's new application.

No action • An 18-month deadline required the EPA to act on or before October 5, 2013, the group contends. Instead, the EPA has neither issued or denied the permit for the 30-year-old plant, which has continued to operate.

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